



**Before The  
State Of Wisconsin  
DIVISION OF HEARINGS AND APPEALS**

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In the Matter of the Removal of an Abandoned  
Sign Owned by Al Ress and Claimed by Darby  
Lane Farms, an Illinois Partnership

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Case No.: TR-00-0004

**FINAL RULING ON  
MOTION FOR SUMMARY JUDGMENT**

On October 8, 1999, the Department of Transportation (Department) issued to Darby Lane Farms a removal order for a sign located along Interstate Highway 94 in the Town of Sommer, Kenosha County. By letter dated December 7, 1999, Attorney Jeffrey M. Hucek, managing partner of Darby Lane Farms, requested a hearing to review the removal order. In response to the request, a hearing was scheduled for June 8, 2000. On May 12, 2000, the Department filed a Motion for Summary Judgment in this matter. On May 22, 2000, Mr. Hucek filed an objection to the Motion for Summary Judgment.

In accordance with secs. 227.47 and 227.53(1)(c), Stats., the PARTIES to this proceeding are certified as follows:

Darby Lane Farms, an Illinois general partnership, by

Attorney Jeffrey M. Hucek, managing partner,  
1900 Spring Road, Suite 200  
Oak Brook, IL 60523

Wisconsin Department of Transportation, by

Attorney John J. Sobotik  
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The Administrative Law Judge (ALJ) issued a proposed ruling granting the Motion for Summary Judgment on June 5, 2000. Darby Lane Farms filed objections to the proposed ruling on June 20, 2000, and the Department of Transportation (Department) filed objections on June 21, 2000. Enclosed with its objections, Darby Lane Farms resubmitted its brief opposing the Motion for Summary Judgment. The arguments raised in the brief are adequately addressed in the Proposed Ruling and for the reasons stated in the Proposed Ruling are not persuasive. In a

separate letter, Darby Lane Farms also specifically objected to the finding in the proposed ruling that “for a significant period of time, the name of the current owner of the sign did not appear on the subject sign nor was the name and address of the current owner readily ascertainable from records on file with the Department.” Darby Lane Farms argues that the evidence in the record only supports a finding that no name or address for the current sign owner appeared on the sign on the one day in August of 1999 that the sign was inspected by an employee of the Department of Transportation.

In its objections, Darby Lane Farms ignores the admissions made by Jeffrey Hucek in his response to the Department’s Interrogatories establishing that Darby Lane Farms acquired ownership of the sign on March 24, 1998, and its name did not appear on the sign as owner of the sign until October, 1999. A reasonable inference from this admission is that from March 24, 1998, until October of 1999 the name of the current owner of the sign (Darby Lane Farms) did not appear on the subject sign. This finding is confirmed by the affidavit of the Department employee who inspected the sign in August of 1999.

The Department objected to the conclusion in the proposed ruling that ownership of the subject sign structure had passed from Al Ress to Frank Hucek and subsequently to Darby Lane Farms. The facts upon which this conclusion is based are set forth in the proposed ruling and are undisputed. The issue is whether based on these facts, Al Ress retained ownership of the sign structure after the termination of his lease with Frank Hucek or ownership of the sign structure transferred to Frank Hucek. The Department cites sec. 704(5), Stats., relating to personalty left by a tenant as authority for the proposition that Frank Hucek or subsequently Darby Lane Farms had the right to sell the sign structure but could not assume ownership of the sign structure.

An outdoor advertising sign structure is more appropriately classified as a trade fixture as opposed to personalty. The common law principle relating to trade fixtures abandoned by a lessee is stated by the Court of Appeals in its decision in Bence v. Spinato, 196 Wis. 2d 398, 538 N.W.2d 614 (Ct. App. 1995). The court stated:

Trade fixtures ordinarily belong to the lessee and are removable by the tenant at the expiration of the lease term (citation omitted). However, if a lessee fails to remove the trade fixtures within a reasonable time after termination of the agreement, it is presumed under common law that the tenant has abandoned them and the fixtures become part of the realty owned by the lessor.

196 Wis. 2d 398, at 410.

Accordingly, when Mr. Ress did not remove the sign structure from Frank Hucek’s property at the termination of the lease, ownership of the sign structure transferred to Mr. Hucek.

The Department also objects to the conclusion in the proposed ruling that the subject sign could not be found abandoned because the evidence in the record does not establish that the sign either had obsolete advertising matter or was without advertising matter for a twelve-month period. The Department does not dispute this conclusion, but rather objects to it because this was not a basis for its Motion for Summary Judgment. Although the Department may not have

intended to argue that the subject sign should be found to have been abandoned based on an absence of advertising content, this argument is suggested in its brief. In the “Facts” section of the brief, the Department notes that “Ms. Kawatski observed the sign from I-94 and concluded it contained no advertising message or content.” In the “Discussion” section of the brief, the Department states, “[Mr. Ress] affirmatively abandoned the sign in 1993 and had no plans to place advertising on it. (Ress Affidavit, pars. 2 and 3). Under s. Trans 201.10(2)(f), the sign is subject to removal because it has been abandoned.”

Darby Lane Farms understood the Department to be arguing that the sign was abandoned because of a lack of advertising matter. In its response brief opposing the Motion for Summary Judgment, Darby Lane Farms states:

The first sentence of Trans 201.10(2)(f) states that a nonconforming or grandfathered sign “may continue as long as it is not destroyed, abandoned or discontinued.” For purposes of this provision the subsection states that “[a] sign is abandoned or discontinued if for a period of 12 months or longer it is composed of obsolete advertising matter or is without advertising matter or is in need of substantial repair.” The evidence that has been submitted and which will be presented at hearing supports a finding that the Darby Lane Farms Sign was not abandoned within this definition. At all times the Darby Lane Farms Sign had readable, current advertising matter.

The findings and conclusions in the Proposed Ruling are supported by the evidence in the record and are responsive to the issues raised by the parties. The proposed ruling is adopted as the final decision in this matter.

The procedure for summary judgment for civil actions in circuit court is governed by sec. 802.08, Stats. For purposes of this ruling the procedure applicable for civil actions will be followed. The purpose of summary judgment is to obviate the need for a trial where there is no genuine issue to any material fact. Heck & Paetow Claim Service, Inc. v. Heck, 93 Wis. 2d. 349, 286 N.W.2d 831 (1980). Summary judgment is not available if any disputed facts exist or if reasonable inferences leading to conflicting results may be drawn on the basis of uncontested facts. Tomlin v. State Farm Mut. Auto Liability Ins. Co., 95 Wis. 2d 215, 290 N.W.2d 285 (1980).

The methodology for summary judgment is that the court first examines the pleadings to determine whether claims have been stated and a material fact issue is presented. If the complaint states a claim and the pleading show the existence of factual issues, the court examines the moving party’s affidavits for evidentiary facts admissible in evidence or other proof to determine whether that party has made a *prima facie* case for summary judgment. If the moving party has made a *prima facie* case, the court examines the affidavits submitted by the opposing party for evidentiary facts and other proof to determine whether genuine issues exist as to any material fact, or reasonable conflicting inferences may be drawn from undisputed facts, and therefore trial is necessary. In re Cherokee Park Plat, 113 Wis. 2d 112, 334 N.W.2d 580 (App. 1983).

Based on the documentation filed by the parties, the history of the subject sign can be summarized as follows. The land on which the subject sign is located was owned by Delbert Innes in the 1960s. In 1966, Delbert Innes rented space for an outdoor advertising sign to Stuckeys. Stuckeys erected a sign structure on the Innes' property along Interstate Highway 94 (I-94) in the Town of Sommer, Kenosha County, Wisconsin, approximately one-quarter mile north of the Highway 142 exit. The sign contained advertising copy for Stuckeys.

Delbert Innes sold the property to Frank Hucek and assigned the lease with Stuckeys to Frank Hucek on May 12, 1969. In 1983, Al Ress purchased the sign structure from Stuckeys and entered into a ten-year lease of the space upon which the sign structure was erected with Frank Hucek. When the lease expired in 1993, Mr. Ress attempted to negotiate another lease with Mr. Hucek; however, the negotiations were unsuccessful and the lease terminated. There is no evidence that Al Ress formally transferred ownership of the subject sign to anyone else.

Frank Hucek died in 1994. Ownership of the property passed to David C. Hucek, Jeffrey M. Hucek, Marybeth H. Downey, and Ann Hucek Burress as beneficiaries of Frank Hucek. The beneficiaries directed that ownership of the property be conveyed to Darby Lane Farms. Formal conveyance of the property passed to Darby Lane Farms by executor's deed from the executor of the estate of Frank Hucek on March 24, 1998. There is no indication in the documents filed by the parties as to who, if anyone, received rental income for use of the subject sign from 1993 until 1998. In October, 1998, Darby Lane Farms entered into an agreement with Eller Media Company for rental of the subject sign structure. In the lease executed with Eller Media Company, Darby Lane Farms indicates that it is owner of both the land upon which the sign has been erected and the actual sign structure.

By letter dated August 11, 1999, Al Ress advised the Department that he was the owner of the subject sign and had abandoned the sign "over five-years ago, because of its dilapidated condition." In the same letter, Mr. Ress informed the Department that the owner of the land upon which the sign was located was Frank Hucek. By letter dated October 8, 1999, the Department sent a removal order for the subject sign to Darby Lane Farms in care of Jeffrey Hucek. By letter dated December 7, 1999, Mr. Hucek requested a hearing to review the sign removal order.

As support for its Motion for Summary Judgment, the Department submitted the affidavit of Lois Kawatski, alleging, among other things, that "[o]n August 20, 1999, [she] viewed the sign. Viewing it from the highway (I-94), [she] could discern no advertising message or content placed on the sign." The Department also submitted the affidavit of Thomas Miller alleging, among other things, that "[i]n or around August, 1999, [he] inspected the sign that is the subject of this litigation in the course of [his] duties. The discrepancy that [he] discovered and reported regarding the sign was that there was no name or address on the sign indicating ownership. The name of 'Frank J. Hucek' or a variation of that name did not appear anywhere on the sign. The name of 'Darby Lane Farms' or any variation of that name did not appear anywhere on the sign."

The parties do not dispute that the sign was erected prior to March 18, 1972, and was lawfully maintained as a legal, nonconforming sign. In its Motion for Summary Judgment, the

Department argues that the subject sign has been abandoned and; therefore, pursuant to sec. Trans 201.10(2)(f), Wis. Adm. Code, may no longer continue as a legal, nonconforming sign.

Section 201.10(2)(f), Wis. Adm. Code, provides:

The sign may continue as long as it is not destroyed, abandoned or discontinued. A sign shall be considered destroyed if it is damaged in excess of 50% of its replacement cost. Any sign destroyed by criminal or tortious acts may be replaced upon a showing by the sign owner that the sign was so destroyed and upon written approval from the district office. Applications for replacement signs shall be submitted to the district office. If the district office fails to send notice of its decision within 10 days after it receives an application, the sign owner may assume that replacement has been approved. As an alternative to replacement, the district office and sign owner may negotiate for the acquisition of the sign which was so destroyed. Approvals of replacements shall contain such terms and conditions as are necessary to ensure that the replacement sign is essentially the same as the sign destroyed. A sign is abandoned or discontinued if for a period of 12 months or longer it is composed of obsolete advertising matter or is without advertising matter or is in need of substantial repair, provided that any period of involuntary discontinuance which occurs during the period a highway is closed shall not be considered. A sign is abandoned if the name of the owner does not appear thereon and if the name and address of the current owner are not readily ascertainable from records on file with the department.

In its motion, the Department alleges three bases upon which the subject should be considered abandoned. The first basis is that when Lois Kawatski observed the subject sign on August 20, 1999, it did not contain any advertising matter. Pursuant to sec. Trans 201.10(2)(f), Wis. Adm. Code, "a sign is abandoned or discontinued if for a period of 12 months or longer it is composed of obsolete advertising matter or is without advertising matter . . . ." In his response to the Department's Interrogatories, Mr. Hucek does not dispute that the sign did not contain advertising matter on August 20, 1999; however, Mr. Hucek avers that from sometime in 1994 until May or June of 1999, the subject sign contained a message advertising McDonalds.

In May or June of 1999, employees of Eller Media Company removed the McDonald's advertisement and placed new advertising matter on the sign structure. The sign currently contains a message stating "Union—Yes, Please Don't Shop Wal-Mart." Although the sign may have not contained any advertising matter on August 20, 1999, the evidence in the record does not establish that the sign either had obsolete advertising matter or was without advertising matter for any twelve-month period of time during its existence.

The second basis the Department alleges for the proposition that the subject sign has been abandoned is that the last known owner of the sign, Al Ress, affirmatively stated that he had abandoned the sign in 1994. The evidence in the record indicates that Al Ress was the owner of the sign from 1983 until sometime in 1994. When he was unable to successfully negotiate an extension of the lease for the space upon which the sign was erected with Frank Hucek, he apparently abandoned his interests in the sign structure. At that point, presumably he would

have been within his rights to remove the sign structure. However, obviously he did not. Someone, presumably Mr. Ress, did place advertising copy for McDonalds on the subject sign in 1994. There is no indication in the record whether McDonalds paid Mr. Ress or anyone else for use of the sign during the period from August, 1994 to June, 1999, when Eller Media Company removed the McDonalds message from the sign.

Although Mr. Ress could have lawfully removed the sign structure at the expiration of the lease with Frank Hucek, he did not and ownership of the structure after that point is unclear. Apparently no written transfer of ownership of the sign exists. In the absence of any clear evidence transferring ownership in the sign structure from Mr. Ress to anyone else, the most likely owner of the sign would be the property owner on whose land the sign was erected. It is unreasonable to accept a statement from Mr. Ress that he abandoned the sign that was issued five years after he last leased the land upon which the sign is located. Mr. Ress' statement can not be accepted as conclusive evidence that the sign has been abandoned.

The final basis upon which the Department argues that the sign is abandoned is that sometime in August of 1999, Thomas Miller, a Department employee, inspected the subject sign. At the time of his inspection Mr. Miller determined the name and address of the current owner of the sign was not indicated on the sign structure. Nor, according to Ms. Kawatski, was the name and address of the current owner ascertainable from records on file with the Department. Jeffrey Hucek averred in his responses to the Department's Interrogatories that as of October 1999, the name Darby Lane Farms appeared on the sign as the sign owner and that by letter dated November 19, 1999, Darby Lane Farms submitted written notification of its ownership of the subject sign to the Department. Mr. Hucek further stated that he has no knowledge whether or not the name and/or address of Frank Hucek appeared anywhere on the sign as the sign owner prior to the transference of the property to Darby Lane Farms.

Section Trans 201.10(2)(f), Wis. Adm. Code, provides that "a sign is abandoned if the name of the owner does not appear thereon and if the name and address of the current owner are not readily ascertainable from records on file with the Department." Based upon Mr. Miller's and Ms. Kawatski's affidavits, the Department has made a *prima facie* case for summary judgment. Although Jeffrey Hucek did not admit that the subject sign did not contain the name of the owner or that the name and address of the owner should have been readily ascertainable from the records on file with the Department, he was unable to affirmatively state that there is any evidence to the contrary.

Furthermore, even assuming, *ad arguendo*, that the name of Frank Hucek appeared on the sign during the time he owned it, the property and sign structure passed to Darby Lane Farms on March 24, 1998. Mr. Hucek admits that the name of Darby Lane Farms did not appear on the subject sign for more than a year and a half after it acquired ownership of the subject sign. Accordingly, it must be found that for a significant period of time, the name of the current owner of the sign did not appear on the subject sign nor was the name and address of the current owner readily ascertainable from records on file with the Department. The subject sign must, therefore, be found to have been abandoned and is subject to removal.

## CONCLUSIONS OF LAW

The Administrator concludes:

1. The subject sign was lawfully in existence on March 18, 1972, and; therefore, is a legal, nonconforming sign.

2. Al Ress purchased the subject sign structure in 1983 and entered into a ten year lease for the space upon which the sign was erected with the property owner, Frank Hucek. After the lease expired in 1994, he abandoned his interests in the sign structure and the sign structure became the property of Frank Hucek and subsequently Darby Lane Farms.

3. There is no evidence that Frank Hucek ever informed the Wisconsin Department of Transportation that ownership of the subject sign was transferred to him. Nor is there any evidence that he ever indicated on the sign structure that he was the owner of the sign structure. The subsequent owner, Darby Lane Farms, did not inform the Wisconsin Department of Transportation that ownership of the subject sign had been transferred to it or indicate on the sign structure that it was the current owner of the sign until after the Department had issued a removal order for the sign to it.

Pursuant to sec. Trans 201.10(2)(f), Wis. Adm. Code, "a sign is abandoned if the name of the owner does not appear thereon and if the name and address of the current owner are not readily ascertainable from records on file with the Department." For a significant period of time the name of the current owner of the sign did not appear on the sign nor was the name and address of the current owner readily ascertainable from records on file with the Department. The subject sign must, therefore, be considered abandoned. A sign which has been abandoned can not continue as a legal, nonconforming sign and is subject to removal.

4. Pursuant to secs. 84.30(18) and 227.43(1)(bg), Wis. Stats., the Division of Hearings and Appeals has the authority to issue the following order.

ORDER

The Administrator orders:

The Department of Transportation's Motion for Summary Judgment is granted and the October 8, 1999 removal order issued by the Department is AFFIRMED.

Dated at Madison, Wisconsin on June 23, 2000.

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DIVISION OF HEARINGS AND APPEALS  
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By: \_\_\_\_\_  
DAVID H. SCHWARZ  
ADMINISTRATOR



### **NOTICE**

Set out below is a list of alternative methods available to persons who may wish to obtain review of the attached decision of the Division. This notice is provided to insure compliance with sec. 227.48, Stats., and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Division of Hearings and Appeals a written petition for rehearing pursuant to sec. 227.49, Stats. Rehearing may only be granted for those reasons set out in sec. 227.49(3), Stats. A petition under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.
2. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefore in accordance with the provisions of secs. 227.52 and 227.53, Stats. Said petition must be filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (1) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Any petition for judicial review shall name the Division of Hearings and Appeals as the respondent. Persons desiring to file for judicial review are advised to closely examine all provisions of secs. 227.52 and 227.53, Stats., to insure strict compliance with all its requirements.